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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ORLANDO ESPINOZA, Defendant and Appellant.	A136927 (San Mateo County Super. Ct. No. SC071182A)

Orlando Espinoza appeals from an order modifying his probation pursuant to amended Penal Code section 1203.067,[1] which sets forth various new probation conditions for registered sex offenders. As we recently concluded in *People v. Douglas M.* (2013) 220 Cal.App.4th 1068 (*Douglas M.*)—a case nearly identical to the present one—because the presumption of prospectivity of Penal Code statutes, mandated by section 3, cannot be rebutted, the provisions of revised section 1203.067 may not be applied retroactively to probationers like appellant, who committed their offenses before the effective date of the amendment. Accordingly, the new terms and conditions of appellant's probation containing these provisions must be stricken.

PROCEDURAL BACKGROUND

On June 17, 2010, appellant was charged by information with one count of possession of child pornography (§ 311.11, subd. (a)). The offense was alleged to have taken place on or about January 7, 2009.

[1]All further statutory references are to the Penal Code unless otherwise indicated.

On June 27, 2011, appellant pleaded no contest to the charged offense.[2]

On September 8, 2011, the trial court suspended imposition of sentence and placed appellant on supervised probation for five years.

On October 12, 2012, over defense counsel's objections, the trial court modified the terms and conditions of appellant's probation, pursuant to amended section 1203.067.

On October 26, 2012, appellant filed a notice of appeal

On May 7, 2013, we granted appellant's petition for a writ of supersedeas and stayed the trial court's probation modification order pending resolution of his appeal.

DISCUSSION

Appellant contends the trial court erred when it applied the provisions of amended section 1203.067 to modify the terms and conditions of his probation.

I. Trial Court Background

Appellant was convicted in 2011 of an offense that took place in 2009.

In a 2011 presentence report, the probation officer reported that Alfred W. Fricke, Ph.D., had recently completed a psychological evaluation of appellant, in which he concluded that appellant "is not a pedophile" and that, "regardless of underlying motivation, [appellant] has to be seen as minimal risk in this case."

Appellant was placed on probation in September 2011. Among other conditions of probation, the trial court ordered that he "participate in and complete a sex offender treatment program as directed by the probation officer," and that, "if required as a condition of treatment, submit to random polygraph and/or voice stress analyzer as directed and assume cost for same." (See former § 1203.067.)

In September 2012, the San Mateo County Probation Department initiated proceedings in this case and several others to modify the terms of probation due to the recent amendment of section 1203.067, subdivision (b). There was no allegation that appellant had violated any of the terms of his probation. Instead, as stated in the

[2]The specific facts underlying appellant's conviction are not relevant to the issues raised on appeal.

prosecution's opposition to appellant's objections to the proposed modification of the terms of probation, appellant's "probation conditions are being modified as part of a mandatory statutory scheme, rather than an individual evaluation within an existing scheme."

On October 12, 2012, over appellant's objections, the trial court ordered the terms and conditions of appellant's probation modified, as follows:

"1. Pursuant to section 290.09 of the Penal Code, you are required to participate in and successfully complete an approved sex offender management treatment program.[3]

"2. Pursuant to section 1203.067 of the Penal Code, the participation in an approved sex offender management treatment program will be for a minimum of one year or up to the entire term of supervised probation, as determined by the sex offender management professional in consultation with the probation officer and as approved by the Court.

"3. Submit to random polygraph examinations and waive any privilege against self incrimination and participate in said polygraph examinations.

"4. The psychotherapist-patient privilege shall be waived, to enable communication between the sex offender management professionals and probation officer."

II. Legal Analysis

A. *Section 1203.067's Provisions*

When appellant was placed on probation in 2011, the terms and conditions of his probation included those found in former section 1203.067, which provided in relevant part:

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[3]Section 290.09, which was also enacted on September 9, 2010, requires, "on or before July 2012," administration of the "SARATSO dynamic tool and the SARATSO future violence tool," inter alia, as follows: "Every sex offender required to register pursuant to Sections 290 to 290.023, inclusive, shall, while on parole or formal probation, participate in an approved sex offender management program, pursuant to Sections 1203.067 and 3008." (§ 290.09, subd. (a)(1).)

"(a) Notwithstanding any other law, before probation may be granted to any person convicted of a felony specified in Section 261, 262, 264.1, 286, 288, 288a, or 289, who is eligible for probation, the court shall do all of the following: [¶] . . . . [¶]

"(b) If a defendant is granted probation pursuant to subdivision (a), the court shall order the defendant to be placed in an appropriate treatment program designed to deal with child molestation or sexual offenders, if an appropriate program is available in the county.

"(c) Any defendant ordered to be placed in a treatment program pursuant to subdivision (b) shall be responsible for paying the expense of his or her participation in the treatment program as determined by the court. The court shall take into consideration the ability of the defendant to pay, and no defendant shall be denied probation because of his or her inability to pay."

In October 2012, appellant's probation conditions were modified to include the provisions of amended section 1203.067, which provides in relevant part:

"(b) On or after July 1, 2012, the terms of probation for persons placed on formal probation for an offense that requires registration pursuant to Sections 290 to 290.023, inclusive, shall include all of the following:

"(1) Persons placed on formal probation prior to July 1, 2012, shall participate in an approved sex offender management program, following the standards developed pursuant to Section 9003, for a period of not less than one year or the remaining term of probation if it is less than one year. The length of the period in the program is to be determined by the certified sex offender management professional in consultation with the probation officer and as approved by the court.

"(2) Persons placed on formal probation on or after July 1, 2012, shall successfully complete a sex offender management program, following the standards developed pursuant to Section 9003, as a condition of release from probation. The length of the period in the program shall be not less than one year, up to the entire period of probation, as determined by the certified sex offender management professional in consultation with the probation officer and as approved by the court.

"(3) Waiver of any privilege against self-incrimination and participation in polygraph examinations, which shall be part of the sex offender management program.

"(4) Waiver of any psychotherapist-patient privilege to enable communication between the sex offender management professional and supervising probation officer, pursuant to Section 290.09.

"(c) Any defendant ordered to be placed in an approved sex offender management program pursuant to subdivision (b) shall be responsible for paying the expense of his or her participation in the program as determined by the court. The court shall take into consideration the ability of the defendant to pay, and no defendant shall be denied probation because of his or her inability to pay."

The effective date of the amended statute was September 9, 2010, but its provisions did not become operative until July 1, 2012. (§ 1203.067, amended by Stats. 2010, ch. 219 (A.B. 1844), § 17, eff. Sept. 9, 2010; § 1203.067, subd. (b).)[4]

B. *Amended Section 1203.067 May Not Be Applied Retroactively*

Section 3 provides: "NOT RETROACTIVE. No part of [the Penal Code] is retroactive, unless expressly so declared." Our Supreme Court has "described section 3, and its identical counterparts in other codes (e.g., Civ. Code, § 3; Code Civ. Proc., § 3), as codifying 'the time-honored principle . . . that in the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.' [Citations.] In applying this principle, we have been cautious not to infer retroactive intent from vague phrases and broad, general language in statutes. [Citations.] Consequently, ' "a statute that is ambiguous with respect to retroactive application is construed . . . to be unambiguously prospective." ' [Citations.]" (*People v. Brown*

[4]" ' "The effective date [of a statute] is . . . the date upon which the statute came into being as an existing law." [Citation.] "[T]he operative date is the date upon which the directives of the statute may be actually implemented." [Citation.] Although the effective and operative dates of a statute are often the same, the Legislature may "postpone the operation of certain statutes until a later time." [Citation.]' [Citation.]" (*People v. Alford* (2007) 42 Cal.4th 749, 753, fn. 2. (*Alford*).)

(2012) 54 Cal.4th 314, 319–320 (*Brown*); accord, *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 287 (*Tapia*).)

In *Douglas M.*, *supra*, 220 Cal.App.4th 1068, we addressed the question of revised section 1203.067's retroactivity, in light of section 3's presumption of prospectivity and the context in which the statute's amendment came about. Because that discussion is equally applicable to the present case, we will utilize *Douglas M.*'*s* analysis here as well.

In *Douglas M.*, *supra*, 220 Cal.App.4th 1068, 1076–1077 we explained: Revised section 1203.067 "was enacted as part of Assembly Bill 1844, the Chelsea King Child Predator Prevention Act of 2010 (Chelsea's Law) (Stats. 2010, ch. 219), which altered numerous statutes governing sex offenses and sex offenders. Although the bill was enacted in September 2010 as urgency legislation, intended to take effect immediately (*id*. at § 29),[5] the section 1203.067 amendments did not become operative until July 2012, almost two years later. The apparent reason for this delayed implementation is reflected in other stated requirements of the bill (see, e.g., § 9003 [requiring development and updating of standards for certification of sex offender management professionals and programs]), which were prerequisites to application of the new provisions of section 1203.067. There is nothing in this legislative history that provides ' " 'a clear and compelling implication' " ' that the Legislature intended the revised statute to apply retroactively. (*Alford, supra,* 42 Cal.4th at p. 754 ['Even without an express declaration, a statute may apply retroactively if there is " 'a clear and compelling implication' " that the Legislature intended such a result'].)

"Given this context, the most reasonable interpretation of the language of amended section 1203.067, subdivision (b), regarding 'persons placed on formal probation prior to July 1, 2012,' is that, for those probationers whose offenses occurred between the effective date of September 9, 2010 and the operative date of July 1, 2012, their

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[5]" ' "Under the California Constitution, a statute enacted at a regular session of the Legislature generally becomes effective on January 1 of the year following its enactment except where the statute is passed as an urgency measure and becomes effective sooner." [Citation.]' (*People v. Camba* (1996) 50 Cal.App.4th 857, 865.)"

participation in—though not necessarily completion of—'an approved sex offender management program' would be required. (*Ibid*.; see *Brown*, *supra*, 54 Cal.4th at pp. 319–320.) This interpretation fulfills the Legislature's intention that this portion of the urgency legislation would take effect immediately upon enactment, applying to probationers whose offenses occurred on or after that date, even though its provisions could not actually be implemented until July 1, 2012. (See *Brown*, at pp. 319–320; see also *People v. Camba*, *supra*, 50 Cal.App.4th at p. 865.)

"Moreover, construing the new statute as retroactive would raise serious questions about its constitutionality. First, people who were on probation before its effective date would now be required to participate in and pay for a new mandatory treatment program, even after many of them had already participated in, paid for, and perhaps completed, court-ordered treatment under their prior probation conditions. (See § 1203.067, subds. (b)(1), (c).) Second, they would have to waive both their privilege against self-incrimination and their psychotherapist-patient privilege. (See § 1203.067, subd. (b)(3) & (4).) Application of these provisions retroactively to such probationers could arguably implicate the federal and state Constitutions' prohibition against ex post facto laws. (U.S. Const., art. I, § 10; Cal. Const., art. I, § 9; see, e.g., *People v. McVickers* (1992) 4 Cal.4th 81, 84 [ex post facto clause is implicated when a new statute is both retrospective and, inter alia, ' " 'makes more burdensome the punishment for a crime, after its commission' " ']; *People v. Delgado* (2006) 140 Cal.App.4th 1157, 1170 ['statutory changes that retroactively impose greater punishment in probation cases violate the ex post facto clause'].)

"These constitutional concerns further support a finding of non-retroactivity under section 3, given the rule of interpretation providing that, ' "[i]f a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, *or raise serious and doubtful constitutional questions*, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even thought[sic] the other construction is equally

reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers." [Citations.]' (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 509, italics added; see, e.g., *Tapia, supra,* 53 Cal.3d at pp. 298–299 [refusing to apply provisions of several new statutes to crimes committed before statutes' effective date because such application both would be 'retrospective' in that it would change legal consequences of defendant's past conduct, and 'would also likely violate the rule against ex post facto legislation, since each of these provisions appears to define conduct as a crime, to increase punishment for a crime, or to eliminate a defense'].)

"In sum, there is nothing in either the language of the statute or its legislative history clearly indicating a legislative intent for revised section 1203.067 to be applied retroactively to probationers whose crimes occurred before its effective date. (See *Brown, supra,* 54 Cal.4th at pp. 319–320; *Alford, supra,* 42 Cal.4th at p. 754.) Moreover, to construe the statute as applying to those probationers would raise serious constitutional questions under the federal and state ex post facto clauses. Therefore, in keeping with the mandate of section 3, the amended statute must be viewed as 'unambiguously prospective,' applying to probationers who committed their crimes on or after the statute's effective date of September 9, 2010. (See *Brown,* at p. 320.)"

In the present case, appellant committed his offense before September 9, 2010. Consequently, the provisions of revised section 1203.067 were improperly applied to him and must be stricken. (See *Douglas M., supra,* 220 Cal.App.4th at pp. 1076–1077.)[6]

DISPOSITION

The judgment is modified to strike the new terms and conditions of probation imposed on appellant pursuant to amended section 1203.067. As so modified, the judgment is affirmed.

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[6]In light of our conclusion that amended section 1203.067 is inapplicable to probationers like appellant who committed their offenses before the effective date of the revised statute, we need not resolve the jurisdictional and constitutional arguments also raised on appeal.

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Kline, P.J.

We concur:

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Richman, J.

_____
Brick, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.